



"Woodall, Mike (ECY)"
<miwo461@ECY.WA.GOV>
11/28/2007 01:32 PM

To Rich McAllister/R10/USEPA/US@EPA
cc
bcc

Subject RE: Proposed Findings of Fact for Swinomish TAS

History:

 This message has been replied to and forwarded.

Hello Rich,

I've attached a 1891 map produced by the Corp of Engineers, pre Swinomish Channel, that you may want to consider in your evaluation. The points that follow are not Ecology policy but rather my cartographic and geographic observation

1. Based on the 1891 map, and the area topology, it would follow that McGlinn Island was not part of mainland Fidalgo at the time the reservation was formed, so the McGlinn area may be tribal land but not necessarily reservation land.

2. It's also clear from the 1891 map that channels existed between the southern end of the Fidalgo and Goat Island which would have limited the tribal boundary in that area. The mud bank extension from the southern portion of the Swinomish Channel north and northwest toward Fidalgo Island (shown in red on the map 2007_map_bndrycompare.pdf' as Swinomish Tribe) matches DNR's Aquatic Parcel data and is clearly a 'built-up' area that didn't exist in it's current shape and form at the time the treaty was written.

3. DNR's Aquatic Land Ownership data, which dates back 100 years, shows an existing Swinomish Channel so it's use as a historic reservation boundary, i.e. pre statehood, is questionable.

4. The ownership of the cut off oxbows on the east side the channel north of La Conner are listed as private (Triton America LLC) from Skagit Co. parcel data. If the tribal boundary is based on tidal access, extreme low water', as Emily suggests, then these areas are probably out.

Ecology GIS is always open to data updates and corrections. Please advise us on completion this boundary determination. Link to the original attached map: <http://content.wsulibs.wsu.edu/cgi-bin/viewer.exe?CISOROOT=/maps&CISOPTR=474&CISOMODE=grid>

Thanks for your time,
Mike

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-----Original Message-----

From: Mcallister.Rich@epamail.epa.gov [mailto:Mcallister.Rich@epamail.epa.gov]
Sent: Monday, November 26, 2007 1:29 PM
To: Gildersleeve, Melissa (ECY)
Subject: Fw: Proposed Findings of Fact for Swinomish TAS

Hi Melissa,

I am forwarding a message from Emily Hutchinson, who is the in-house Tribal attorney for the Swinomish working with me on the TAS application. She has attached a map with several layers that shows the DNR map information as well as what the Tribe understands is Ecology's map information. The TAS application included as Exhibit 6 a copy of an 1873 Executive Order which describes the boundary: "Beginning at low-water mark on the shore of Similk Bay . . ." The TAS application also points to a 1936 Washington Supreme Court decision in *State v. Edwards* 188 Wash. 467, 470-72, 62 P.2d 1094 (1936) as holding that the reservation extends to the extreme low water mark to the south, west and north sides of the reservation.

Also included below with the map are several documents which show that the land known as "McGlinn Island", now located across the Swinomish Channel from the Reservation, is actually part of the Reservation. Apparently it was cut off from Fidalgo Island when the Army Corps of Engineers straightened the Channel in the early 1900's (also see p. 6 of the TAS application).

Here is the language in EPA's Proposed Findings of Fact that describe the Reservation boundaries starting on p. 4:

The Reservation consists of all the lands and waters within the exterior regulatory boundaries of the Reservation, which are depicted in the map entitled "General Waterbodies on and around the Swinomish Indian Reservation", which is included as Exhibit 7 to the initial Application. For purposes of the TAS Application, the Reservation includes the Swinomish Channel to the midpoint and extends to the extreme low water mark of the south, west, and north sides of the reservation, which border waterways. *State v. Edwards*, 188 Wash. 467, 470-72, 62 P.2d 1094 (1936).

These exterior boundaries of the Reservation were established by the Treaty of Point Elliot. The Treaty Reservation is described as that part of Fidalgo Island east of a line running from Fidalgo Bay due south to Similk Bay. This boundary line corresponds to a marshy intertidal area that connected Fidalgo and Similk Bays at the time the Treaty was signed. Early maps also depict what is now McGlinn Island as a peninsula on the southeast end of Fidalgo Island, rather than a separate island.

Subsequently, in 1873, President Grant diminished the boundaries of the Reservation by Executive Order on September 9, 1873. See Executive Order, attached as Exhibit 6 to the initial Application. The Executive Order moved the northern boundary of the Reservation east so as to exclude the peninsula of land now known as March's Point from within the exterior boundaries of the Reservation.

The Application describes how in the early 1900s, the Army Corps of Engineers straightened and dredged the Swinomish Channel,

cutting off the two oxbows to the north and McGlinn Island to the south and transforming the Channel from a water body that went dry during low tide to one that was navigable throughout the tidal cycles. Recently, SITC purchased the property interests in McGlinn Island with funds from a federal appropriation.

The boundaries of the Reservation extend at least as far as the historical midpoint of the Swinomish Channel, to the extreme low water mark of the southern and western waters surrounding the Reservation, to a line that trends east from the head of Turners Bay, then heads north to Padilla Bay. The initial Application includes the Regulatory Boundaries Map, attached in Exhibit 7, which shows the boundaries. These regulatory boundaries, which are shown in the maps enclosed as Exhibit 7 to the Application describe the area over which the Tribe wishes to assert authority to establish CWA water quality standards under CWA Section 303(c), 33 U.S.C. § 1313(c), and CWA Section 401, 33 U.S.C. § 1341.

I hope that this material is useful in evaluating the Reservation boundaries for purposes of completing Ecology's review of the TAS application and the Proposed Findings of Fact. Please let me know what you think and whether Ecology has a suggestion on how to describe the boundaries.

Rich McAllister
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----- Forwarded by Rich McAllister/R10/USEPA/US on 11/26/2007 12:49 PM

"Emily
Hutchinson"
<ehutchinson@swi
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To
Rich McAllister/R10/USEPA/US@EPA
cc

11/26/2007 12:41
PM

Subject
RE: FW: Proposed Findings of Fact
for Swinomish TAS

Rich,

I hope you had a lovely Thanksgiving holiday. As we discussed last week, I have attached a map prepared by Elissa (our GIS tech) containing the following sets of data: (1) Ecology's tribal boundary layer; (2) DNR's aquatic lands layer; and (3) the Tribe's boundary layer. All three of these layers have been overlaid onto a 2004 aerial photograph

of the Reservation uplands and tidelands taken at a low (but not lowest low) tide.

As the Tribe's submissions indicate, both state and federal courts have held that the Reservation boundary extends to the line of extreme low water. The Reservation boundary therefore changes as the line of extreme low water shifts. Nevertheless, data from the Washington state agency responsible for managing submerged lands (DNR) indicates that tribal tidelands extend beyond the Reservation boundary depicted by Ecology. This is particularly true in several of the areas specifically flagged by Ecology staff as areas of concern, including the Swinomish Channel, Padilla Bay, and Skagit Bay. However, even the DNR data includes less than all of the tidelands adjacent to the Reservation shown in the aerial photograph. The Tribe's depiction of the Reservation boundary therefore appears to track more closely the line of extreme low water, particularly when you consider the fact that the aerial photograph was not taken at lowest low tide.

I have also attached copies of the four deeds conveying McGlinn Island back to the United States in trust for the Tribe and the informational title status reports showing that each of the four McGlinn Island parcels is indeed held in trust for the Tribe. The tract ID portion of each of the TSRs identifies the land area by '122,' the code for on-Reservation lands of the Swinomish Reservation.

Feel free to contact me with any questions. If after reviewing this documentation you believe a meeting with you, Matt, and/or Ecology staff would still be helpful, please let me know.

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(See attached file: 2007_Map_BndryCompare.pdf) (See attached file: 199212170034.pdf) (See attached file: 199212170035.pdf) (See attached file: 199212170036 (2).pdf) (See attached file: 199212170037 (2).pdf) (See attached file: McGlinnTSRs.pdf)



swinomish1891.pdf

Information contained in this Sheet due to loss of data
has been obtained by Chief of Engineers the 17th

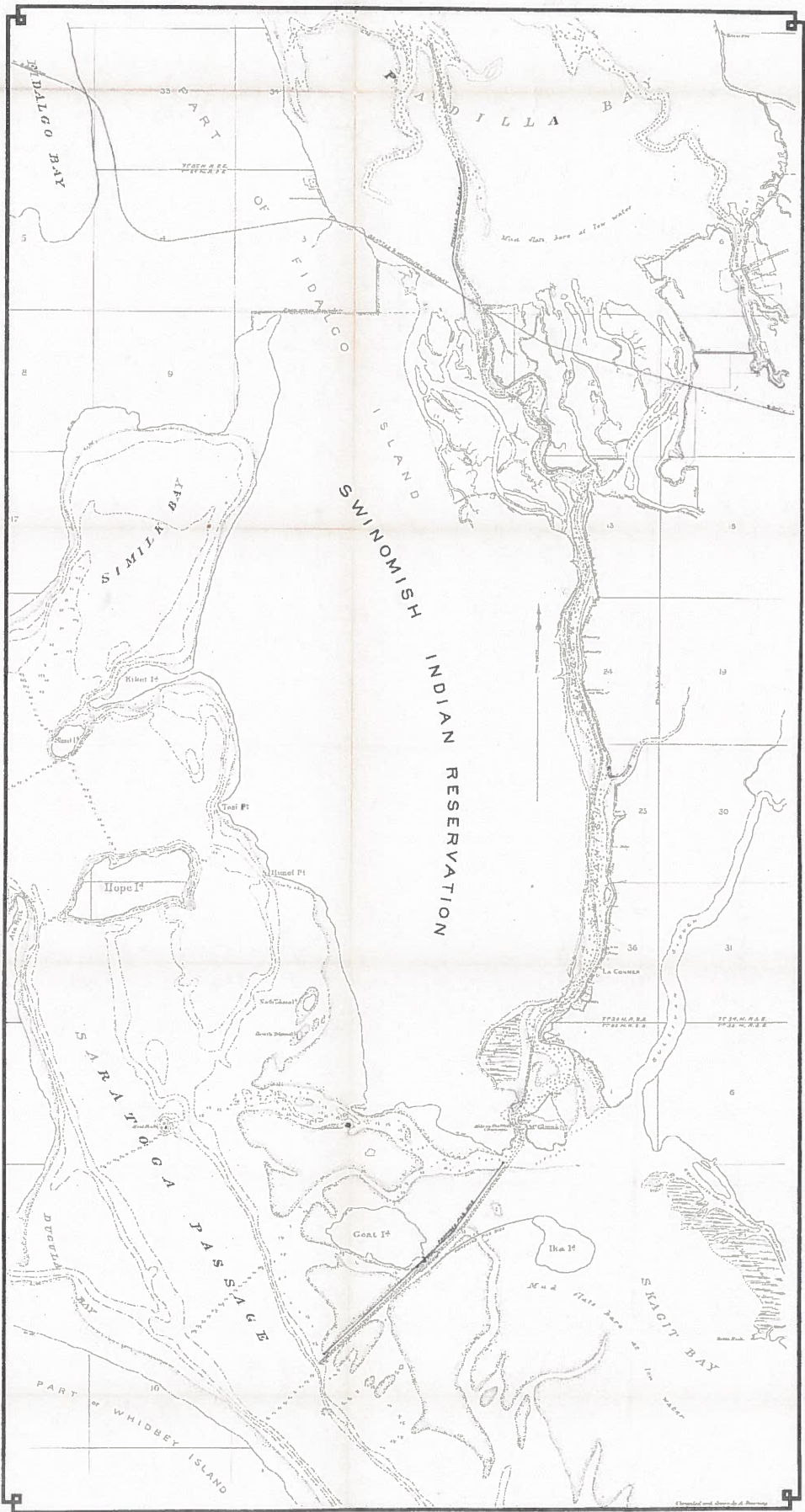
Chart of SWINOMISH SLOUGH, SKAGIT Co. WASHINGTON SHOWING PROPOSED CHANNEL & DREDGE Compiled from Survey made by Lt. M. H. Henshaw, A. E. Dyer May 1887 The coast line and from charts of the U. S. C. & G. S.

Plotted on Instrument
To make a channel and to make a road, 4 ft in
depth at mean low water, by dredging
and by construction pile-dikes in places where
the water is shallow.

Harold L. B. Brown
Captain Corps of Engineers

U. S. Engineer Office
Portland, Oregon
Dec 19 1890

Forwarded to the Chief of Engineers with report of the work.



Charted and described by

U. S. Coast and Geodetic Survey
Portland, Oregon, 21
March 1891
Volume 1, 12